

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	CFTC DOCKET NO. 01-02
	:	
Frederic J. Mersch	:	
15 Timberlane	:	ORDER MAKING FINDINGS
Sioux City, Iowa 51108,	:	AND IMPOSING SANCTIONS
	:	
Respondent.	:	
	:	

I.

On November 7, 2000, the Commodity Futures Trading Commission ("Commission") filed a four-count Complaint and Notice of Hearing ("Complaint") against Frederic J. Mersch ("Mersch"). The Complaint charged that Mersch violated Sections 4a(e), 4i and 6(c) of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 6a(e), 6i and 9(c) (1994), as amended, Commission Regulations ("Regulations") 18.04(a)(5) and 18.04(a)(9)(ii), 17 C.F.R. §§ 18.04(a)(5) and 18.04(a)(9)(ii) (2001), and former Regulation 18.04(d), 17 C.F.R. 18.04(d) (1996).¹

II.

In order to dispose of the allegations and issues raised in the Complaint, Mersch has submitted an Offer of Settlement ("Offer") that the Commission has determined to accept. Without admitting or denying any of the allegations of the Complaint or the findings herein, and prior to any adjudication on the merits, Mersch acknowledges service of this Order Making Findings and Imposing Sanctions ("Order"). Mersch consents to the use of the findings herein in

¹ The Act was amended by the Commodity Futures Modernization Act of 2000, Appendix E to Pub. L. No. 106-554, 114 Stat. 2763 (2000). However, this amendment resulted in no material change to any provision of the Act that the Complaint alleges Mersch violated. Moreover, Regulation 18.04(d) was in effect during part of the period relevant to the Complaint and Order. The Commission rescinded Regulation 18.04(d) effective April 14, 1997. See 62 Fed. Reg. 6112 (Jan. 31, 1997).

this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.²

III.

The Commission finds the following:

A. SUMMARY

While trading his own account and other accounts held in the names of family members and acquaintances, Mersch exceeded contract market trading limits for pork belly futures and filed two false reports with the Commission. Specifically, at various times during the period of August 2, 1996 through March 31, 1999 ("relevant period"), Mersch traded his own account and controlled the trading in other accounts carried respectively in the names of his wife and adult children ("family accounts"), and other acquaintances ("acquaintance accounts"). When aggregated, futures positions in these accounts exceeded the trading limits for frozen pork belly futures at the Chicago Mercantile Exchange ("CME") on one day in August 1996 and four days in March 1998. In addition, Mersch filed two false reports with the Commission that failed to disclose that he controlled the family and acquaintance accounts. Mersch failed to update one of his inaccurate reports and held or controlled reportable positions on at least 160 trading days while the report remained inaccurate. He also traded on at least 100 days during that period.

B. RESPONDENT

Frederic J. Mersch resides at 15 Timberlane, Sioux City, Iowa 51108. He has never been registered with the Commission in any capacity.

C. FACTS

1. THE OPENING, TRADING AND FUNDING OF THE ACCOUNTS

During the period November 1990 through December 1999, Mersch directed his wife and children to open commodity futures trading accounts that Mersch funded and traded on their behalf. None of Mersch's family members had prior experience trading commodity futures and Mersch acknowledged that he made the trading decisions for all the family accounts. Mersch also directly or indirectly funded and controlled the trading of other accounts carried in the names of acquaintances. When aggregated, the Mersch, family, and acquaintance accounts

² Mersch does not consent to the use of the Offer or this Order as the sole basis for any other proceeding brought by the Commission other than a proceeding to enforce the terms of this Order, nor does Mersch consent to the use of the Offer, or the findings in the Order consented to in the Offer, by any other person or entity in this or any other proceeding. The findings made in the Order are not binding on any other person or entity named as a defendant or respondent in any other proceeding.

exceeded the CME's position limits for frozen pork belly futures on August 7, 1996, and March 17, 18, 25, and 26, 1998.³

2. FILING REPORTS WITH THE COMMISSION

On August 2, 1996, Mersch signed a Form 40 ("1996 Form 40"), which was filed with the Commission, in which he stated that he did not control the futures trading of any other person. At that time, Mersch controlled two family accounts. Mersch also failed to disclose on the 1996 Form 40 that he held at least a ten-percent financial interest in two family accounts despite having provided the vast majority, if not all, of the funding for those accounts. Mersch never amended the 1996 Form 40 to make it accurate. During the period of August 6, 1996 through April 13, 1997, Mersch held or controlled reportable positions in frozen pork belly futures in his or family or acquaintance accounts on at least 160 trading days.⁴ During that same period, he also traded commodities on at least 100 days while holding or controlling reportable positions.

On March 19, 1999, Mersch signed a second Form 40 ("1999 Form 40"), which was filed with the Commission, in which he acknowledged that he controlled the futures trading of two family members but failed to disclose that he controlled the trading of a third family member and an acquaintance. Mersch also failed to disclose on the 1999 Form 40 that he held at least a ten-percent financial interest in the accounts of three family members and two acquaintances, despite having provided the vast majority, if not all the funding for those accounts.

³ The CME, which is located at 30 South Wacker Drive, Chicago, Illinois, is, and was during the relevant period, a designated contract market for trading in frozen pork belly futures pursuant to Section 5 of the Act, 7 U.S.C. § 7 (1994). During the relevant period, CME Rule 1402.E provided that futures position limits for frozen pork bellies were:

- 1) 1,000 contracts net long or short in all contract months;
- 2) 800 contracts long or short in any contract month;
- 3) 200 contracts long or short in the May contract or 150 contracts long or short in any other expiring contract month as of the close of business on the first business day following the first Friday of the contract month; and
- 4) 150 contracts long or short in the May contract or 100 contracts long or short in any other expiring contract month as of the close of the business on the sixth business day following the first Friday of the contract month.

The Commission approved these limits on February 10, 1994.

⁴ During the relevant period, the Commission required that certain reports be filed for each commodity futures account with a "reportable position" as defined in Regulations 15.00(b)(1)(i) and 15.03, 17 C.F.R. §§ 15.00(b)(1)(i) and 15.03 (1996). Regulation 15.03 provided that the reportable position for any contract not specifically listed (which included frozen pork belly futures contracts) was twenty-five (25) contracts.

D. LEGAL DISCUSSION

1. MERSCH EXCEEDED CONTRACT MARKET TRADING LIMITS

Section 4a(e) of the Act prohibits any person from violating a contract market's trading limits if the Commission has approved those limits. During the period August 1996 through April 1998, Commission-approved trading limits on frozen pork belly futures were in effect at the CME as provided by CME Rule 1402.E. For purposes of evaluating Mersch's possible violation under Section 4a(e) of the Act, the aggregation provisions of Section 4a(a) of the Act apply. In re Volume Investors, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. CCH ¶ 25,234 at 38,676-77 (CFTC Feb. 10, 1992). Section 4a(a) of the Act requires that all futures positions controlled by a person be included in determining whether trading limits set by the Commission have been violated.⁵ Because Mersch controlled his own account and the family and acquaintance accounts, Mersch's aggregated positions exceeded CME trading limits on one day in August 1996 and on four days in March 1998. Accordingly, Mersch violated Section 4a(e) of the Act.

2. MERSCH FILED FALSE REPORTS AND FAILED TO UPDATE INACCURATE REPORTS

Mersch also violated the Act and the Regulations by filing two false Form 40s with the Commission. Regulation 18.04(a)(5) requires that a reporting trader who completes a Form 40 include the name and address of each person whose trading the reporting trader controlled. In addition, Regulation 18.04(a)(9)(ii) requires that a reporting trader provide the names of other accounts in which the reporting trader has a ten-percent or greater financial interest. Section 6(c) of the Act authorizes administrative proceedings against any person who willfully makes materially false and misleading statements or omissions in a report filed with the Commission. "Willfulness" includes acting with reckless disregard of regulatory obligations. See In re Squadrito, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,262 at 38,828 (CFTC March 27, 1992) ("knowing/reckless disregard" standard applied to determine whether registrant willfully made a false statement on registration application). On August 2, 1996 and March 19, 1999, Mersch signed Form 40s, which were filed with the Commission, on which he, at a minimum, recklessly failed to disclose that he controlled various family and acquaintance accounts and that he held a ten-percent or greater interest in a number of family and acquaintance accounts. Consequently, Mersch filed false Form 40s in violation of Section 6(c) of the Act and Regulations 18.04(a)(5) and 18.04(a)(9)(ii).

Mersch further violated the Act and Regulations by failing to update his inaccurate 1996 Form 40. Pursuant to former Regulation 18.04(d) (in effect until April 13, 1997), when holding

⁵ CME Rule 1402.F also explicitly stated that positions in all accounts controlled by a person would be aggregated in determining whether that person had exceeded Exchange trading limits.

or controlling a reportable position or trading while holding such a position, Mersch had a duty to update inaccurate information regarding the name and address of any person whose futures trading he controlled and the names of other trader accounts in which he had a ten-percent or greater financial interest. Pursuant to Section 4i of the Act, Mersch was prohibited from entering into any futures trading or from holding open futures positions in excess of amounts fixed by the Commission unless he filed accurate reports with the Commission. During the period August 6, 1996 through April 13, 1997, Mersch held or controlled reportable positions on at least 160 trading days while his 1996 Form 40 remained inaccurate. He also traded on at least 100 days during that period in which he held or controlled a reportable position in his and/or family or acquaintance accounts. Accordingly, Mersch's failure to update his inaccurate 1996 Form 40 violated prior Regulation 18.04(d), and Mersch's holding or controlling reportable positions and trading while holding or controlling such positions without updating the 1996 Form 40 violated Section 4i of the Act.

IV.

OFFER OF SETTLEMENT

Mersch has submitted an Offer of Settlement in which, without admitting or denying the findings herein, he acknowledges service of the Complaint and this Order, admits the jurisdiction of the Commission with respect to the matters set forth in the Complaint and this Order, and waives: (1) a hearing; (2) all post-hearing procedures; (3) judicial review by any court; (4) any objection to the staff's participation in the Commission's consideration of the Offer; (5) all claims which he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994), as amended by Pub. L. No. 104-121, §§ 231-232, 110 Stat. 862-63, and part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2001), relating to, or arising from this action; and (6) any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief.

Mersch stipulates that the record basis on which this Order is entered shall consist solely of the findings in this Order to which he has consented in the Offer. Mersch also consents to the use of the findings contained in this Order in this proceeding and in any other proceedings brought by the Commission or to which the Commission is a party. Mersch further consents to the Commission's issuance of this Order, which makes findings as set forth herein and orders that Mersch: (1) cease and desist from violating the provisions of the Act he is found to have violated; (2) pay a civil monetary penalty of twenty-five thousand dollars (\$25,000) as set forth below; (3) be prohibited from directly or indirectly trading on or subject to the rules of any registered entity, as defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29), as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. No. 106-554, 114 Stat. 2763 (2000), for two years, and directs all registered entities to refuse Mersch privileges during that period; and (4) comply with his undertakings as set forth below.

V.

FINDING OF VIOLATIONS

Solely on the basis of Mersch's consent, as evidenced by the Offer, and without any adjudication on the merits, the Commission finds that Mersch violated Sections 4a(e), 4i and 6(c) of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 6a(e), 6i and 9(c) (1994), as amended, Regulations 18.04(a)(5) and 18.04(a)(9)(ii), 17 C.F.R. §§ 18.04(a)(5) and 18.04(a)(9)(ii) (2001), and prior Regulation 18.04(d), 17 C.F.R. § 18.04(d) (1996).

VI.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Mersch shall cease and desist from violating Sections 4a(e), 4i and 6(c) of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 6a(e), 6i and 9(c) (1994), as amended by the Commodity Futures Modernization Act of 2000, Appendix E to Pub. L. No. 106-554, 114 Stat. 2763 (2000), and from violating Regulations 18.04(a)(5) and 18.04(a)(9)(ii), 17 C.F.R. §§ 18.04(a)(5) and 18.04(a)(9)(ii) (2001);

2. Mersch shall be prohibited from directly or indirectly trading on or subject to the rules of any registered entity, as defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29), as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. No. 106-554, 114 Stat. 2763 (2000), for two years, beginning on the third Monday after the date of the Order, and all registered entities shall refuse Mersch privileges during that period;

3. Mersch shall pay a civil monetary penalty in the amount of Twenty-five Thousand Dollars (\$25,000) within 10 (ten) business days of the date of the Order, and make such payment by electronic funds transfer to the account of the Commission at the United States Treasury or by certified check or bank cashier's check made payable to the Commodity Futures Trading Commission and addressed to Dennese Posey, or her successor, Division of Trading and Markets, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies Mersch and the name and docket number of this proceeding. A copy of the cover letter and of the form of payment shall be simultaneously transmitted to Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581;

4. Mersch shall comply with his undertaking: (1) not to directly or indirectly fund any other person's or entity's commodity futures or options trading during the two-year trading prohibition ordered herein; (2) following the end of the two-year trading prohibition, never to

enter orders for commodity futures or options accounts held in the name of any other person or entity without first receiving a written authorization and never to allow any other person or entity to enter orders for his account without first giving that person or entity a written authorization; and

5. Mersch agrees that neither he nor any of his agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Complaint or findings in the Order or creating, or tending to create, the impression that the Complaint or Order is without a factual basis; provided, however, that nothing in this provision shall affect: (i) Mersch's testimonial obligations; or (ii) his right to take legal positions in other proceedings to which the Commission is not a party. Mersch will undertake all steps necessary to assure that all agents and employees under his authority and control understand and comply with this agreement.

Unless otherwise specified, the provisions of this Order shall be effective on this date. A copy of this Order shall be served on Mersch at the address set forth in the caption of this Order, on all contract markets, and on the National Futures Association.

By the Commission.

Jean A. Webb
Secretary to the Commodity
Futures Trading Commission

Date: September 4, 2001